BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of:	)	***MM Docket***
	)	***No. 00-244***
Definition of Radio Markets	)	
(Amendment of 47 CFR §73.3555)	)	

To: The Commission

WEST VIRGINIA RADIO CORPORATION

Respectfully submitted

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SUMMARY

West Virginia Radio Corporation and affiliates ("WVRC") respectfully submits that the Commission should take no action to change the present Rules and station counting methodology described and set forth in 47 C.F.R. §73.3555(a).

The Commission's authority to change the radio market definition rules in place at the time Section 202(b) of the Telecommunications Act of 1996 was enacted is questionable. Congress in adopting the specific market tier caps set forth in the Act was relying on the radio market definitions used by the Commission. There is nothing in the legislative history to suggest otherwise, and it is clear from reference to the House Minority Report, that the Congress had been made aware of the pace of radio consolidation between 1992 and 1996 and made a conscious policy decision to draft rules permitting greater consolidation. Even in the absence of this legislative history, the rules of construction of federal statutes, as articulated by the U.S. Supreme Court, require the presumption that Congress implicitly adopted the radio market definition rules first adopted in 1992.

Even if the Commission were free to embark upon a new course of action, it would be unwise and inefficient to develop any rules or processing procedures that duplicate the effort and function of other federal agencies. If a transaction does pose a genuine issue of undue control of market revenues, that matter can best be handled by either the Federal Trade Commission or the Antitrust Division of the U.S. Department of Justice. It is a waste of taxpayer dollars and the Commission's resources to engage in such economic analysis.

Moreover, none of the market definition methodologies the Commission says it is considering would, if adopted, resolve stated concerns about "excessive consolidation." The radio broadcast industry is already substantially consolidated, and amending the rules now will not change that. Only by a massive restructuring of the industry including forced divestitures of existing groups, which the Commission says it does not intend, could return us to the "fragmented"

radio market landscape that the Commission only a few years ago deemed to be harmful to the public interest. Such restructuring would create tremendous economic upheaval, causing station values to plummet and would reduce incentives of licensees to provide "niche" programming to target audiences: something that is economically infeasible for the standalone or single AM-FM owner. The partial retroactivity the Commission is proposing will only harm the standalones and small group owners, and prevent them from trying to remain competitive in a consolidated industry.

A decision to abandon the radio contour overlap market definition procedure and relying, instead on radio market definitions provided by outside commercial services is ill-advised. There are numerous problems that will result in using Arbitron radio market definitions. Not the least of these is the ephemeral nature of audience ratings from one survey period to the next. Because a station's share of the audience must meet a minimum percentage for it to be counted, the number of stations in an Arbitron market can vary from book to book. Moreover, use of audience data to define markets injects the Commission unavoidably in the programming decisions of a licensee that ultimately affect audience ratings. This raises serious First Amendment issues.

Similarly, reliance on financial data from sources such as BIA to make ownership decisions is also ill-advised. The accuracy of BIA data depends upon the voluntary response by stations in the market to report earnings, and to report them accurately. The resulting data can be substantially off, as proved in the Charleston, West Virginia market.

Finally, WVRC submits that the partially retroactive application of any new rules to presently pending applications, especially those filed prior to the issuance of the *NPRM* is a violation of administrative due process and a denial of equal protection of the laws. Parties with applications presently pending before the Commission relied in good faith upon the rules as written, which in turn were mandated by Congressional statute. To make such applications subject to a new rule or standard, not even yet conceived, is arbitrary and capricious and irrational agency decision-making.

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COMMENTS OF
WEST VIRGINIA RADIO CORPORATION

Comes now WEST VIRGINIA RADIO CORPORATION and Affiliated Companies ("WVRC"), by Counsel, and pursuant to Sections 1.415 and 1.419 of the Rules (47 C.F.R. §§1.415, 1.419) and paragraph 15 of the above-captioned *NPRM*,[1] hereby respectfully submits the following *Comments* in Response to the Commission's *Notice of Proposed Rule Making* (FCC 00-427), released December 13, 2000 in the above-captioned MM Docket. For the reasons presented below, WVRC believes that no change in the Rules or policies governing the definition of Radio Markets, as referred to in 47 CFR §73.3555(a) should be undertaken.

I. INTRODUCTION

A. Background of Proceeding.

[1] By *Order* released January 10, 2001 (DA 01-71), the Due Date for Comments in this Proceeding was extended from January 26, 2001 to February 26, 2001. Accordingly, these Comments are timely submitted.

1 By *Order* released December 13, 2000 the Commission issued a *Notice of Proposed Rule Making* seeking comment on whether and how the Commission should modify the way in which it determines the dimensions of radio markets and counts the number of stations in them. In addition, the Commission stated it was seeking comment on whether and how the present rules should be amended to change the method by which the number of stations owned by a party in a radio market for the purpose of applying the multiple ownership rules under 47 C.F.R. §73.3555.[2]

2 The current rules and method of defining radio markets arose out of a proceeding initiated in 1991. The result of the proceeding was the adopting of two-tier market definition of (1) fewer than 15 radio stations and (2) markets which contained more than 15 radio stations.[3] The methodology for defining a radio market was there established as:

> that area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) of the mutually overlapping stations proposing to have common ownership.[4]

The Commission also described the method to be used for counting the number of radio stations in that market, *i.e.*,

> [t]he number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community

[2] The complete text of Section 73.3555 of the Rules is set forth in ***Appendix A*** to these Comments.

[3] *Report and Order*, MM Docket 91-140, 7 FCC Rcd 2755 (1992), *recon. granted in part, Memorandum Opinion and Order and Further Notice of Proposed Rule Making,* in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992).

[4] *Id*., 7 FCC Rcd at 6395.

contours overlap or intersect the principal community contours of the commonly-owned stations.[5]

3 This methodology was implicitly adopted by Congress in adopting Section 202(b)(1) of the *Telecommunications Act of 1996*,[6] when it directed the Commission to amend its

[5] *Report and Order*, MM Docket 91-140, 7 FCC Rcd 2755 at 2778-79.

[6] Pub. L. No. 104-104, 110 Stat. 56 (1996). *See Order, In the Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 (1996).

rules to establish four market tiers precisely defined in the statute,[7] but which made no change to the methodology announced by the Commission in MM Docket 91-140.

4 The Commission stated in the instant *NPRM* that:

> Using this methodology, we evaluate whether a proposed transaction complies with our ownership rules by first determining the boundaries of each market created by the transaction. Thus, we look to all stations that will be commonly owned after the proposed transaction is consummated and group these stations into "markets" based on which stations have mutually overlapping signal contours.
>
> * * * * *
>
> To determine the total number of stations "in the market," as defined above, we count all stations whose principal community contours overlap the principal community contour of *any* one or more of the stations whose contours define the market. Thus, in the market formed by the contours of stations A, B and C, any station whose contour overlapped the contour of A, B *o*r C would be counted as "in the market."[8]

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[7] Section 202(b)(1) provided that:

> (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
>
> (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
>
> (C) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
>
> (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

[8] *NPRM*, ¶¶3-4.

5 After adoption of the Telecommunications Act of 1996, the methodology first announced in MM Docket 91-140 was codified as part of Section 73.3555(a), specifically, subsection (a)(3)(ii), which provides as follows:

> (3) For purposes of this paragraph (a):
>
> * * * * *
>
> (ii) The number of stations in a radio market is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question (i.e., the station for which an authorization is sought and any station in the same service that would be commonly owned whose principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service.

6 Difficulties arise, according to the Commission, because a different methodology is used to determine the number of stations that any entity may own in a given market:

> For this purpose, we only count those stations whose principal community contours overlap the common overlap area of *all* of the stations whose contours define the market. Thus, a station owned by the applicant that is counted as being "in the market" because its contour overlaps the contour of at least one of the stations that create the market will not be counted as a station owned by the applicant in the market unless its contour overlaps the area which the contours of *all* of the stations that define the market have in common.[9]

In more descriptive terms, the Audio Services Staff analyzes the situation as one encompassing "multiple markets," and an applicant must be in compliance with §73.3555(a)(1) of the Rules for *each* of these multiple markets that might be created by the partial overlap. The problem, at least for some members of the Commission, is than the "daisy chain" of multiple radio markets in a larger geographic region can lead to an entity owning many more stations that the rules permit • but only if one regards the "daisy chain" as a single market.[10]

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[9] *Id.*, ¶4.

[10] This is addressed in more detail below.

7 In any event, the Commission stated that the use of what it regards as inconsistent methodologies has brought about results not intended by Congress or the Commission when it adopted the current rules.[11] It concluded that:

> [W]e question whether the use of overlapping signal contours is an appropriate means of defining market boundaries and counting the number of stations in a market. Our methodology sometimes leads to results that are completely at odds with commercial market definitions and economic reality, and may undermine the structure of the statute to allow levels of ownership that increase commensurately with the size of the market.[12]

[11] Transactions recently approved by the Mass Media Bureau staff involving the "Wichita, Kansas", and "Youngstown, Ohio" radio markets were presented as examples of how anomalous results can be obtained. *NPRM*, at ¶5.

[12] *Id.*, ¶6.

8 The Commission offered no specific language for amending the rules or policies. Rather, it presented in fairly sketchy form some "options" that might be adopted to eliminate the perceived problem. One option discussed was to eliminate the possibility of market fragmentation, or "daisy chains," by counting all stations owned by the applicant in that market, whether or not there was overlap with every other station in the common group.[13] The Commission believes that such an approach "may better reflect the statute's structure, and lend consistency and predictability to the commercial marketplace."[14]

9 A second option offered was to abandon the current definition of defining the market and rely on "commercially determined market definitions" such as used by the Arbitron Company. The Commission noted that the United States Department of Justice makes use of Arbitron data in its competition analysis of radio station mergers.[15] However, the Commission also acknowledged that many radio stations are not in an Arbitron market. Nevertheless, the Commission invited comment on whether it should abandon the station counting method described in §73.3555(a)(3)(ii) of the rules, and instead use definitions of radio markets determined by Arbitron or other outside entity. If so, it asked, how should it deal with those markets not rated by Arbitron.[16]

10 A third option offered by the Commission was to use a different contour overlap standard, such as counting only those stations whose principal community contours overlapped or intersected by a certain percentage the overlap area of the station or stations to be acquired, rather than the entire common area of overlap of all of the stations presently owned and those to be acquired.[17] This should have the effect of shrinking the size of the market, according to the

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[13] *Id.*, ¶9.

[14] *Id.*

[15] *Id.*, at ¶10.

[16] *Id.*, at ¶¶10-11.

[17] *Id.*, at ¶12.

Commission, reducing or eliminating the "daisy-chain" effect which can now occur under the rules.[18]

[18] The Commission concluded by asking whether or not the definition should include all stations "actually heard" in a market, which would in turn require a newly-defined standard of "heard" as well as "market." *Id*.

11 Although initially professing that any new rules and definitions adopted would not be applied retroactively to existing ownership combinations, the Commission went on to state that those merger applications presently pending or filed subsequent to the adoption date of the *NPRM*[19] which present market definition "problems" will be held in abeyance until the adoption of any new rule, and then processed according to that new rule.[20] Moreover, while not specifically stated, the implication of such an "interim" policy is that grandfathered existing combinations will not be permitted to be sold or acquired as a single group, but would have to be broken up upon such sale, as is the case today with grandfathered newspaper-broadcast combinations.[21]

B. Statement of Interest.

12 WVRC is the Licensee of Radio Stations WAJR (AM) and WVAQ (FM). Morgantown, West Virginia, and WSSN (FM), Weston, West Virginia. The majority owners of WVRC also have majority control of the following affiliated broadcast companies:

Affiliate Licensee Name	***Call Sign(s) and Community***
West Virginia Radio Corporation of Elkins	WDNE AM-FM, Elkins, WV
West Virginia Radio Corporation of Clarksburg	WFBY (FM), Clarksburg, WV
West Virginia Radio Corporation of Salem	WAJR-FM, Salem, WV
West Virginia Radio Corporation of Charleston	WCAW (AM), WCHS (AM, WSWW (AM), WKWS (FM) & WVAF (FM), Charleston, WV and WKAZ (FM), Miami, WV

[19] January 10, 2001.

[20] *Id.*, at ¶14.

[21] *See* 47 C.F.R. §73.2555(d); *Second Report and Order*, Docket 18110, released 1/31/75; *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

As a group owner of radio stations in the Morgantown and Charleston radio markets, WVRC has a direct interest in the outcome of this proceeding. However, WVRC has an even more direct interest because West Virginia Radio Corporation of Charleston has pending before the Commission an Application to acquire Radio Station WRVZ (FM), Pocatalico, West Virginia, whose principal community contours overlap with the contours of WVRC's stations in the Charleston WV market. That Application has been pending since May 30, 2000, due to its designation by the Mass Media Bureau Staff as raising media market concentration issues,[22] and it is presumably is being held hostage to this Rule Making, as stated in Paragraph 14 of the *NPRM*.[23]

13 As is argued in more detail below, WVRC believes that there should be no change in §73.3555(a), or in the way the Commission presently determines compliance therewith. In any event, subjecting applications whose parties applied in good faith under current rules and procedures to an interminable holding pattern, and retroactively applying as yet undetermined and unarticulated standards to such applications while permitting huge media conglomerates to retain their holdings is patently unfair and a denial of administrative due process.

II. ARGUMENT

A. The Commission's Authority to Change the Rules of Radio Market Definition is Questionable.

14 As noted above, the current method of defining, and determining the size of radio markets had been in effect for four years at the time Congress adopted the *Telecommunications Act of 1996*. Congress was thus aware of the Commission's use of principal community contours defining and counting the number of stations in a radio market when it passed the 1996 Act.

[22] BALH-20000530ACG. *See* Report No. 24755, released June 14, 2000, page 2.

[23] In point of fact, the WRVZ Application does *not* raise the multiple radio markets issue discussed in the Youngstown, Ohio example (*NPRM, Exhibit B*). All of the presently owned or to be acquired stations overlap with, or are completely encompassed by each other. *See* Radio Market Study in BALH-20000530ACG.

15 Not only was Congress *aware* of the methodology, that methodology was *codified* into the Act. Indeed, if the Commission had not developed rules for defining the radio market prior to the passage of the Act, the 4-tiered approach specified in Section 202(b)(1) of the statute would make no sense.

16 The FCC's speculation that Congress could not have intended[24] the significant consolidation in the radio industry that has taken place is unwarranted. There is no legislative history indicating such an intent, and a review of the various drafts of the Act suggest the opposite: that the adopted language was a compromise of language that was even broader.[25]

17 Although Congress did not specifically adopt the definition of a radio market set forth in Section 73.3555(a)(3)(ii), it did not need to do so. The language defining a radio market contained in §73.3555(a)(3)(ii) was already on the books and had been unchanged since it was originally adopted in 1992. Congress was certainly aware of that language, and relied on it when arriving at the four-tier approach to local radio ownership.[26]

18 It also cannot be disputed that Congress was, and remains fully aware of the pace of mergers and consolidations in the radio industry.[27] Yet, it has made no move to amend the Act

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[24] *NPRM*, ¶¶6-9.

[25] Earlier House proposals called for the complete elimination of ownership restrictions on radio ownership.

[26] *See, Separate Statement of Commissioner Harold W. Furchtgott-Roth, NPRM*, p. 23; *Separate Statement of Commissioner [now Chairman] Michael K. Powell, NPRM*, p. 24.

[27] The Minority Report on H.R. 1555 (the bill which ultimately became the basis for the final language of the Telecommunications Act) expressed concern over the number of radio consolidations that had already taken place under the "Duopoly Rule," adopted in MM Docket 91-140. *See H. Rept.* 104-204, House of

or otherwise curtail its application. This is certainly not due to any trepidation on the part of the present Congress. When the Commission has ventured into new areas of regulation not contemplated by Congress, Congress, or at least many of its more vocal members, has been quick to criticize the Commission and to warn that it is proceeding on dangerous ground.

Representatives, 1st Session, "Dissenting Views • Mass Media Concentration."

19 An apt example of Congress' reaction to what it perceived as unwise, if not unauthorized new initiatives is the rider contained in the *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act*.[28] The rider significantly scaled back the reach and breadth of the Commission's Low Power FM *Order*,[29] and directed the Commission to require LPFM applications to meet third-adjacency channel protection standards contained in §73.207 of the Rules.[30]

20 Accordingly, WVRC believes that the Commission is precluded from modifying the substance of §73.3555(a)(3)(ii) without prior consultation with Congress. If the Commission fails to obtain Congressional blessing to a change, it is reasonable to expect that appeals of any *Report and Order* in this proceeding will be taken to the U.S. Court of Appeals with a sustainable claim of *ultra vires.*

B. No Need for Amendment of the Rules or Counting Methodologies has been Established.

1. No Evidence of Economic or other Harm to the Public Interest has been Cited.

[28] 2001, H.R. 4942, enacting into law H.R. 5548, 106th Congress, Title VI, Sec. 632 (2000).

[29] MM Docket 99-25, adopted January 20, 2000, released January 27, 2000.

[30] *See*, *Notice of Acceptance of Low Power Fm Broadcast Applications and Notification of Petitions to Deny Deadline*, (Report No. LPFM-S-1, released: December 21, 2000)

21 In its very brief narrative statement, the Commission identified not a single harm that has resulted from the present method of defining radio markets. Individual statements by Commissioners over the past two years have expressed concern that there was a *danger* of control of advertising rates.[31] However, in not a single instance of what some Commissioners regard as an unintended "over-consolidated" market has evidence of anti-competitive conduct come to light.

[31] *See*, *NPRM*, separate Statements of Chairman Kennard and Commissioner Tristani. While both allege that the public has been harmed by the creation of multi-station groups in some markets, neither their individual Statements, nor the *NPRM* itself, identify what economic or other harm has occurred by the application of the current rules.

22 Missing from the Commission's analysis is any factual data tending to prove that the present level of consolidation is *bad*. To be sure, many have pointed to the "dangers" of over-consolidation, such as economic control of the marketplace and lack of diversity of programming, but empirical evidence of harm to the public interest caused by radio consolidation is woefully lacking.[32] Given radio's small share of the total advertising revenue pie in any market, it is extremely unlikely that a radio group owner could or would wield an undesirable level of control of local or national advertising in that market.[33] Rather, the evidence that does exist demonstrates that market *fragmentation* is bad. In fact, by 1992 the Commission had concluded that *market fragmentation* in the radio industry was an *evil*, and that revising its radio local ownership rules specifically to permit consolidation was the *cure*.[34]

2. Proffered Examples of Supposedly Unintended Effects of the Current Rules, Employ Equivocal Meanings of Term, "Radio Market".

23 The only "harm" of the present rules discussed by the Commission was that the present methodology described in §73.3555(a)(3)(ii) and used by the Mass results in allowing an entity to own or control radio stations in excess of that permitted under §73.3555(a)(1). In initiating the present proceeding, the Commission offered examples of these "unintended effects." These examples, noted the Commission, establish that a single entity could end up owning more than the maximum number of stations through the multi-market analysis (*i.e.*, "daisy-chaining") the

[32] Some have argued, erroneously, that there is less community service programming today than previously. WVRC cannot speak for every radio market but that is certainly not true with respect to either the Morgantown or Charleston, West Virginia radio markets.

[33] Newspapers and other print media still account for the largest share, followed by television advertising.

[34] *Id.*

Staff requires. However, in decrying this unintended effect, the Commission itself has equivocated on the term, "Radio Market."

24 Exceeding the maximum number specified in §73.3555(a)(1) is only possible if one juggles two meanings of Radio Market simultaneously. The daisy-chain ownership situation shown in the Youngstown, Ohio example covers territory both within and without the Youngstown MSA. As the current rules are applied, there are, in fact, *several* radio markets defined by the contour overlap of the commonly-owned stations. Stations in the southwestern-most contour "market" do not overlap with stations in the northeastern-most contour market, and, in fact, may not be listened to, or listenable by, residents in the northeast contour market. Thus, calling them all "Youngstown" stations is inappropriate.

25 A second form of equivocation is the reference to Arbitron as the determiner of the Radio Market. If Arbitron shows only **X** number of stations in the "market" while the contour analysis methodology specified in §73.3555(a)(3)(ii) shows a much larger number, that is because Arbitron defines the term, "market" differently than §73.3555(a)(3)(ii). As noted below, the Arbitron radio market is commensurate with the MSA for that urban area as defined by the U.S. Bureau of the Census. There will always be a difference in result if one starts out with two different ways of counting. WVRC submits that much of the exasperation over recent Mass Media Bureau rulings expressed by individual Commissioners and public interest groups is due to this kind of unwitting equivocation and not to any internal inconsistency in the application of the Rules.

3. Other Mechanisms Presently Exist to Address Legitimate Concerns Over Undue Economic Concentration.

26 -- *Other Agencies Are Better Suited to Investigate and Adjudicate Antitrust Issues.* Even if examples of harm to the public in the form of artificially elevating the rates charged for advertising could be documented, other federal agencies are much better suited to deal with such matters.

27 Market concentration and anti-competitive issues are within the purview of both the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. Detailed federal legislation and regulations under the umbrella of *Hart-Scott-Rodino*[35] have been enacted to regulate acquisitions and mergers of all forms of business, not just electronic media. Moreover, even though a proposed consolidation, because of its size, does not trigger the pre-merger filing requirements under *Hart-Scott-Rodino*, the Justice Department can, nevertheless, launch its own inquiry into the proposed merger and can order the parties to defer completing the merger until after its investigation has been completed.[36]

28 Indeed, in the case of the WRVZ transaction still pending before the FCC, the purchase price ($800,000) is far, far less than the statutory threshold ($15,000,000) which would trigger a pre-merger filing under *Hart-Scott-Rodino*. Nevertheless, the Department of Justice notified the parties to the WRVZ transaction that it intended to investigate the proposed merger, and requested the submission of information concerning the two companies involved. Apparently satisfied that the proposed merger did not present anti-competitive issues, the DOJ subsequently notified the parties *and the FCC* that it was closing its investigation and taking no further action in the matter. The Mass Media Bureau Staff has taken the position, however, that despite the DOJ's termination of its investigation, the Commission will continue to hold the WRVZ application in limbo because its "economists" still have unspecified "concerns."[37]

29 At the same time, the Staff continues to grant other proposed transactions involving multiple station groups in, just recently, the Binghamton, New York Radio Market. According to

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[35] *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, Pub. L. 94-435, 90 Stat. 1383 (Sept. 30, 1976), codified as 15 U.S.C. §18a; *see also* accompanying FTC regulations in Title 16 C.F.R. §§801-803.

[36] Moreover, individuals of groups believing that an unfair trade practice has taken place can also refer the matter to the Attorney General's Office of their respective State.

[37] Both the DOJ's notice of termination of its investigation, and the Staff's subsequent advisory that it still had "issues" were communicated orally to the appropriate parties. Nothing has been reduced to writing or released in the form of a public document subject to public scrutiny. Nor has the Staff identified what its concerns are or given WVRC an opportunity to address them in a further supplemental showing.

Commissioner Tristani,[38] the Staff's action will permit two radio station group owners (one of them a subsidiary of media giant, Clear Channel Communications) to control 91.2% of the advertising revenues in that market.[39]

30 -- *Devotion of Commission Resources to Economic Analyses of Proposed Radio Mergers and Consolidations is Inefficient and Wasteful of Public Resources.* Even in an era of Federal budget surpluses, it makes no sense to have multiple agencies engaged in the same or similar activity, even to the point of reviewing the same proposed transactions. It is a waste of taxpayer's money for the FCC to duplicate the activity of other federal agencies, and such activity also opens the FCC to criticism that it is acting outside the scope of its Charter by the affected industry, government watchdogs and members of Congress alike.

31 As a practical matter, even if antitrust inquiries were within the statutory purview of the FCC, the Commission lacks both the manpower and expertise to conduct extensive market concentration investigations of proposed radio mergers. Attempting to play this role has led to numerous applications being held hostage to an amorphous inquiry with no clear rules defining how

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[38] Press Statement of FCC Commissioner Gloria Tristani *Re: Application for Radio License Transfer from Titus Broadcasting to Clear Channel Broadcasting in Binghamton, NY*, released February 21, 2001. (*See* BAL-20000724AAV, granted February 15, 2001). In contrast, it should be noted that the WRVZ application was filed almost two months before the Binghamton application, yet remains, apparently, on the desk of some MMB analyst.

[39] As shown in a Supplemental Amendment to the Assignee's portion responding to the Market Concentration Notice, WVRC demonstrated that the WRVZ Transaction would result in only two groups have at most 71% of the in-market radio advertising revenues. Since WVRC already operates WRVZ pursuant to a Time Brokerage Agreement, the proposed transfer of ownership would have a *nil effect* on the actual distribution of radio advertising revenues in the Charleston, WV market.

such situations should be resolved. The result is an inefficient use of human and financial resources.

32 There are plenty of agenda items already on the Commission's plate that require the Commission's particular expertise. Cooperation with other agencies, rather than attempts to duplicate their functions, should be the goal and practice of the FCC. If the Commission believes that a proposed transaction would result in an egregious concentration of market power, it has the option of referring the matter to the Justice Department. Accordingly, WVRC respectfully submits that the Commission should direct the Mass Media Bureau to abandon its present practice of flagging certain proposed transactions for special economic study using unidentified and unauthorized criteria.

C. None of the New Methodologies Being Considered by the Commission will Address its Fundamental Concern.

1. The Radio Broadcast Industry is Already Substantially Consolidated.

33 Even if the previous objections to amendment of the Rules were disregarded, the revision of radio market definitions will not address the Commission's stated concern. First, and foremost, it should be noted that the Radio Broadcast Industry is already substantially consolidated as a result of Commission-approved mergers and acquisitions over the past five years. If the intent of the Commission in initiating this proceeding is to put a brake on excessive radio market "concentration," any action that might be taken now is far too late.[40]

34 Moreover, changing the Rules now would only penalize a few parties in smaller markets, but would leave the large combinations untouched.[41] Given the current consolidated state of the broadcast industry, one might possibly conclude that the instant proceeding is little more than

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[40] As noted by Commissioner Ness in her separate Statement attached to the *NPRM*, any final rules that may be issued in this proceeding, are likely to be "the gilded padlock on the proverbial barn door, with the horse of consolidation galloping over the horizon." *NPRM*, p. 20.

[41] *Id.* As noted above, the Commission has said it does not contemplate retroactively applying any new rules to roll back previously approved mergers, nor requiring any divestitures of existing combinations. *NPRM*, ¶12-14.

a public relations gesture by the Commission to demonstrate to critics that it has its finger on the pulse of the industry and is keeping the evils of over-consolidation in check. While WVRC does not doubt the sincere motives of the Commission in initiating this proceeding, it is unable to see how any action short of wide-scale restructuring of the ownership of the radio industry will achieve any result other than the uneven treatment of broadcasters in smaller markets trying to remain competitive by taking advantage of the economies of scale offered by consolidation • a benefit touted by the Commission as a necessary public interest goal less than a decade ago.[42]

35 Similarly, WVRC believes that the Commission's original contention that radio consolidation permits more, not less diversity of programming has been proven correct. In the Charleston, West Virginia market, for example, the ownership by WVRC of a group of stations has allowed it to provide specialized programming formats that simply would not be economically feasible in a standalone operation.[43]

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[42] *See, e.g., Report and Order, Revision of Radio Rules and Policies*, 7 FCC Rcd. 2755, 70 RR 2d 903 (1992), *recon. granted in part*, 7 FCC 2d 6387, 71 RR 2d 227 (1992) ("Duopoly Order").

[43] Each of WVRC's six owned stations has a different program format. Moreover, on Station WCHS (AM), WVRC provides a news-talk format. Over seven hours per day of news and public affairs programming over WCHS is *locally produced*. The balance of news/talk programming is either network news or syndicated public affairs features, such as Rush Limbaugh, as well as some regional sports network programming. In January of 2000, WVRC began programming its LMA partner WRVZ (FM), Pocatalico, WV, with an urban format, which has been gratefully received by the minority community in Charleston. The all-news and urban formats provided by WVRC are the only such services provided by radio stations within the Charleston, WV metro.

36 WVRC recognizes that diversity of programming and diversity of ownership are not the same thing. However, those who decry the loss of diversity of local radio ownership have a myopic view of what constitutes media diversity. The Commission has repeatedly cited to the fact that there are now a plethora of media voices in almost every market.[44] With the rise of the Internet, and the technology permitting "streaming" audio of radio stations over the Internet, local broadcasters find themselves facing more, not less competition, from many different owners on many different media. The local citizen has only one set of ears and one set of eyes • and can only attend to one media source at a time.[45] If it is broadcast television or cable TV, or the Internet, or the newspaper, VCR or DVD player, or the CD or MP3 Player, or the outdoor advertising display, then it is not radio. All compete for the "hearts and minds" of the local citizenry.[46]

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[44] *See, e.g., Inquiry into §73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, Gen. Docket No. 84-282, 102 FCC 2d 145 (1985) ("1985 Fairness Report"); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1019 (1990).

[45] Admittedly an exception exists with respect to school-age children, who apparently are able to access multiple media sources simultaneously, such as listening to blaring rock music while doing their homework.

[46] In the Charleston, West Virginia Radio Market, for example, WVRC's amended showing established that Charleston was served by a plethora of competing media besides radio, including seven commercial and five noncommercial television stations, three LPTV stations, four cable systems, three MDS licensees with multichannel capacity, DirectTV DBS, three daily newspapers, two weekly papers (one of them black-owned), three college newspapers, and many internet web sites including 12 local radio stations, (at least 4000 nation-wide) and a dozen websites devoted to news and information about Charleston, WV. *See* BALH-20000530ACG, Amendment of October 17, 2000.

2. Reliance on Outside Commercial Services to Provide the Data to Define the Radio Market is Ill-Advised.

37 As a way of eliminating the multiple meanings of "radio market," the Commission has inquired whether it should return to the use of data provided by outside commercial entities, such as Arbitron to define a radio market.[47] The Commission acknowledged in a footnote that it had abandoned its original proposal in 1992 to use Arbitron definitions of radio *markets* due to their fluctuating nature, and Arbitron's tendency either to undercount or overcount the number of stations in the market.[48] Without explanation, it has now suggested that these problems are not "insurmountable" and that use of Arbitron's market definitions might result in more "accurate measures" of the number of radio stations than current methodologies.[49] WVRC respectfully submits that the use of Arbitron Audience market definitions or audience listener ratings as a means of regulating the local ownership of radio stations remains unworkable.

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[47] The Commission did employ Arbitron audience data between 1992 and 1996, with the adoption of the "Duopoly Rule," *supra* Note 42. If the proposed combination would exceed 25% of the radio audience, as determined by the latest published Arbitron Report for that market, the acquisition, under the 1992 rule, would not be approved. *Radio Rules and Policies Reconsideration Order*, 7 FCC Rcd 6387, 71 RR 2d 227 ¶55 (1992).

[48] *NPRM*, p. 5, note 18.

[49] *Id.*

38 Initially, it must be noted that the Commission itself admits that many Radio Markets are not rated by Arbitron. Thus, a different system would have to be employed for those markets. This could create anomalous and inequitable results no less bothersome than the system currently used. The Commission has already had experience with using alternate methodologies, and has seen first hand the anomalous results that can be obtained.[50]

[50] An apt example of the kind of inequity that can occur is the *WANV* case. WANV L.P. sought to acquire WANV (AM), Waynesboro, and WANV-FM, Staunton, Virginia. The applicant already owned and AM-FM combination in Staunton. Arbitron had originally rated the Waynesboro-Staunton market, but "declassified" it, when an insufficient number of stations subscribed to its service. Under the rules then applicable, the applicant was permitted to use a county-by-county calculation to arrive at total audience share. The Staff approved the transaction over objections by other stations in the market who had pointed out that using current county data only for those counties making up the previously-defined metro would exceed the 25% cap permitted by the Rules. *John S. Logan, Esq. (WANV)* (1800B3-JB/LLS), Nov. 30. 1993 (BAL-930129GF *et al.)*.

39 Separate from the "Unrated Market" problem is the fact that audience ratings vary widely from book to book and year to year. Some markets are rated only once a year, some twice, some quarterly. Dramatic changes can and do occur, due to change in formats, audience listening behavior, and economic climate.[51] Again, there is no need to speculate on the anomalous results that use of audience listening data can bring. Between 1992 and 1996 the Commission struggled with just such questions.[52]

40 Another problem with reliance on Arbitron as the defining source of radio markets is that only a limited amount of data from Arbitron is proposed to be used, *i.e.*, the number of stations *in the MSA metro* receiving a 0.1% share of listeners • the so-called 12+ AQH data.[53] WVRC respectfully submits that reliance solely on 12+ AQH numbers artificially limits the size of the radio market by excluding stations that are outside the MSA metro but which have significant listenership.[54] Utilization of MSA boundaries instead of principal community contours produces a situation that is guaranteed to produce arbitrary and anomalous results. Thus, if a station places a principal community contour over some or all of the MSA, but is licensed to a community lying outside the metro, it is not listed by Arbitron in its 12+ AQH data. It is treated as an "out-of-market" station. Moreover even if the Commission were to use all of the Arbitron data showing all of the stations having listenership within the MSA, that is still an artificial limitation, since there

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[51] Because Arbitron lists only those stations in a market that have a certain level of listenership, a radio market can shrink or expand with each rating period.

[52] The very first Commission decision applying the 1992 Rules involved WVRC, who had applied to acquire WCAW (AM) and WVAF (FM) in Charleston. A competitor sought to block the acquisition on the grounds that between the time WVRC filed its application and the end of the public comment period, Arbitron had released a new book showing that the proposed grouping would exceed the 25% audience cap. The Staff referred the case to the full Commission as a case of first impression. The Commission ruled that WVRC had relied in good faith on the Arbitron ratings published at the time, and that new information becoming available after the application was on file, would not be considered. *Franklin Communications Partners, L.P.*, 8 FCC Rcd. 4909 (1993).

[53] AQH = "Average Quarter Hour" number of listeners, 12 and older, listening Monday through Sunday from 6:00 a.m. to Midnight.

[54] Arbitron relies, in turn on the U.S. Department of Labor, Bureau of the Census for the definition of Metropolitan Statistical Areas ("MSA's"). The boundaries of the MSA correspond to pertinent jurisdictional

are listeners to those same stations who reside just outside a particular jurisdictional boundary that encompasses that MSA.

41 Accordingly, using artificial boundaries such as the political boundaries of a Metropolitan Statistical Area as a means of defining the radio market, while continuing to use engineering contours to determine local ownership compliance will create anomalous results even more significant than presently experienced. WVRC thus urges the Commission to reject the use of Arbitron data as a means of defining radio markets or compliance with multiple ownership rules and policies.

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boundaries.

42 Second, use of commercially prepared *financial data*, such as that compiled by BIA, to make ownership decisions is ill-advised.[55] Since BIA adopts Arbitron's market definitions, and republishes its 12+ AQH data, the same problems associated with the use of Arbitron data exist with the use of BIA financial data.

43 Moreover, BIA Radio Market Revenue Data is based on self-reporting by broadcasters in the market as well as their estimates of revenues earned by their competitors. Many broadcasters decline to participate in BIA revenue surveys, and there is no means of verifying the numbers that are reported. There is no official, reliable source of station revenue data, and even using statistical methods to allow for "fudge factors" BIA's estimates can be *substantially* in error.

44 A case in point, once again, is the Charleston, West Virginia Radio Market. BIA's estimates of WVRC's 1999 revenues in the Charleston, WV Market were off by over $2 Million, representing, in this case a 33-_% exaggeration.[56] (WVRC had not participated in BIA survey of revenues). Even if all other numbers were correct the revenue percentages are thrown completely askew by the bad data. Accordingly, the Commission should not base its rules and policies on unverifiable inaccurate information that is susceptible, indeed, even *prone* to substantial distortion by those doing the voluntary reporting.[57]

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[55] The Mass Media Bureau Staff currently uses data from the BIA revenue share database to determine whether or not a proposed combination should be "flagged" as presenting an undue concentration of market control issue.

[56] "Supplemental Showing in Support of Grant of Application" amendment of 10/17/00 to BALH-20000530ACG.

[57] BIA's data is also subject to the same criticism as that of Arbitron's, *i.e.*, it uses the same arbitrary political boundaries to define a radio market. Thus, revenues of stations lying outside the MSA are not identified.

45 Market definitions that have station revenues or audience listening preferences as their basis have inherently the same defect. As with Arbitron audience ratings, a broadcaster's share of advertising revenues can change markedly from year to year • not only due to general economic conditions, but also *vis-a-vis* other stations in the market. Reliance on BIA or other commercially prepared financial data, even if it were 100% accurate, would unfairly *freeze* a licensee's market position for the indefinite future, with the result being that the *economic basis* for such freeze would become less and less accurate over time. A change in format or the acquisition or loss of popular syndicated programming can cause both ratings and revenues to fluctuate significantly up or down in a short time frame. The Commission's decision on whether or not to permit a proposed consolidation, however, has much more lasting effect. Use of audience and revenue data to make what can amount to *allocation* decisions is simply bad public policy.

D. The Commission's Proposal to Apply New Guidelines and Rules to Proposed Transactions Filed Long Before the Issuance of the NPRM Violates Administrative Due Process and is a Denial of Equal Protection of the Laws.

46 As stated in the *NPRM*, the Commission proposes to make any rule adopted pursuant to this proceeding applicable to all pending and subsequently-filed applications for consent to proposed consolidations.[58] WVRC believes that this is unfair and works an proportionately greater inequity on those applicants who filed prior to the adoption and issuance of the *NPRM*. Parties such as WVRC with applications presently on file relied in good faith on the current rule and existing precedent. To refuse now to grant such applications solely on the basis of new rules not even articulated is patently unfair, and contrary to past administrative practice.

47 The Commission has repeatedly denied requests by applicants to waive current rules based upon a proposed rule change not yet adopted. The Commission has also imposed forfeitures on licensees for violations of rules that have been proposed to be eliminated or have already been

[58] ¶¶12-14.

eliminated subsequent to the alleged misconduct. To do otherwise, it has suggested, is to second-guess the outcome of the Rule Making. The reverse should also be true. The rules in effect *at the time of filing* should apply to those applications still pending, not future rules yet to be articulated or given substance.

48 In past proceedings, the Commission has cited an applicant's good faith reliance on the existence of an existing rule and that licensee's compliance with it as a reason not to deny an application, even though conditions had changed between the time of filing the application and the time the application was acted on. Such was the case with WVRC's acquisition of Stations WCAW-WVAF under the 1992 radio duopoly rule cited above.[59] To make any new rule retroactive in the instant case, where not even a specific rule has been proposed is especially unfair to parties who based their plans on present rules and were in compliance with them.

49 Finally, it should be noted that none of the cases presently pending was flagged because of the Commission's stated concern with the current rule's definition of radio market. Rather, the language of the public notice flagging the application stated that the application was to be reviewed because of a concern with *market concentration and control, to wit:*

> NOTE: BASED ON OUR INITIAL ANALYSIS OF THIS APPLICATION AND OTHER PUBLICLY AVAILABLE INFORMATION, INCLUDING ADVERTISING REVENUE SHARE DATA FROM THE BIA DATABASE, THE COMMISSION INTENDS TO CONDUCT ADDITIONAL ANALYSIS OF THE OWNERSHIP CONCENTRATION IN THE RELEVANT MARKET. THIS ANALYSIS IS UNDERTAKEN PURSUANT TO THE COMMISSION'S OBLIGATION UNDER SECTION 310 (D) OF THE COMMUNICATIONS ACT, 47 U.S.C. SECTION 310(D), TO GRANT AN APPLICATION TO TRANSFER OR ASSIGN A BROADCAST LICENSE OR PERMIT ONLY IF SO DOING SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. WE REQUEST THAT ANYONE INTERESTED IN FILING A RESPONSE TO THIS NOTICE SPECIFICALLY ADDRESS THE ISSUE OF CONCENTRATION AND ITS EFFECT ON COMPETITION AND DIVERSITY IN THE BROADCAST MARKETS AT ISSUE AND SERVE THE RESPONSE ON THE PARTIES.

50 Now, in some cases a year or more after the date of filing, the Commission has said it will further delay processing of these applications, but on completely different grounds, *i.e.*, whether the application of a totally new definition of radio market *not yet articulated* would permit grant of such applications. This procedure is fundamentally a violation of an applicant's right to

[59] *Franklin Communications Partners, L.P., supra*, 8 FCC Rcd 4909 (1993).

administrative due process and equal protection of the laws under the Fifth Amendment to the Constitution of the United States. Accordingly, WVRC urges the Commission to abandon its stated intention to make any new rule apply to applications presently pending, or at least those applications filed before the issuance of the instant *NPRM*.

III. CONCLUSION.

51 The instant *NPRM* is a reaction to criticism that, despite their implicit codification by Congress in the Telecommunications Act of 1996, the current rules governing the definition of radio markets should be revised. Without pointing to a single example of anti-competitive conduct or market control, the Commission states that the anomalous results in Pine Bluff, Arkansas and Youngstown, Ohio "could not have been intended" by Congress, and are inherently harmful. No legislative history is offered to support such a notion, and as pointed out by Commissioner Furchtgott-Roth, "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, 'the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"[60]

52 Moreover, much of the criticism is based upon the assumption that the MSA is the appropriate definition for a radio market rather than the principal community contour methodology specified in §73.3555(a)(3)(ii). It must be remembered that MSA's are defined by political jurisdictional boundaries, not by radio coverage contours. The present methodology, which requires use of *city-grade* (not merely interference-free) contours assures that the number of stations counted, even though some overlap no more than tangentially, are indeed accessible, *i.e.*, *listenable* by the populations within the defined market.

[60] Separate Statement of Commissioner Harold W. Furchtgott-Roth, citing *CFTC v. Schor*, 478 U.S. 833, 845 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

53 To adopt a definition of radio markets that depends upon what is *listened to*, rather than what is *listenable*, is to intrude heavily on a licensee's First Amendment right to provide programming it believes will serve its listeners. Such a definition also *freezes* in place what is actually a dynamic, highly fluctuating situation that can vary dramatically from ratings book to ratings book. The federal government has neither the right, nor the expertise to make ownership decisions based upon the programming content of stations at a frozen moment in time, and such intrusion into a licensee's editorial judgments is clearly a violation of the First Amendment.

54 Further, any attempt made now to address what is alleged to be excessive consolidation without massive forced divestiture and heavy-handed restructuring of the industry will only penalize those few remaining standalones and closely-held small group owners that are trying to remain competitive in an increasingly competitive media marketplace. Adding to those licensees' burdens by blocking their attempts to achieve the economic benefits of consolidation at this late date would constitute a denial of administrative due process and equal protection of the laws.

55. Even more pernicious is the Commission's proposal to apply an undefined, but presumably more restrictive definition of radio market to pending applications, many on file long before the adoption of the current *NPRM*. It is inconceivable that a reviewing Court would permit this kind of arbitrary and capricious discrimination against applicants who relied in good faith upon the current statutory and regulatory criteria governing local radio ownership.

56. If the Commission should fail to terminate this proceeding without adopting new rules (the wisest course of action), it *must* apply any new rule *prospectively* only. Even prospective application of a new, more restrictive rule, would mean that current radio groups, created and approved under current rules, would be required to be broken up upon sale. Such action would greatly diminish the market value of the group, and deprive owners of a significant percentage of the actual value of their investment. In other cases, it could wreak financial ruin on some owners by causing a negative return on investment. In the absence of documented empirical findings by

the Commission that massive restructuring of the radio industry and a return to the market fragmentation of the first half of the 1990's is mandated by the public interest, WVRC believes new regulations at odds with Congressional intent will not survive judicial scrutiny. Since the Commission has not even attempted in its *NPRM* to identify or articulate specific harms whose elimination or public interest benefits to be achieved would outweigh the tremendous economic upheaval such a plan would create, it is unlikely that any reviewing judicial body would consider itself constrained to affirm such an irrational plan.

WHEREFORE, the foregoing premises considered, WVRC respectfully urges the Commission not to adopt any new rules or regulations and to terminate this proceeding forthwith.

Respectfully submitted,

WEST VIRGINIA RADIO CORPORATION

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